

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 26, 2024

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROBERT MILDES, a married man,

Plaintiff,

v.

SHRINERS HOSPITALS FOR
CHILDREN, a foreign nonprofit
corporation,

Defendant.

No. 2:23-CV-00356-SAB

**ORDER REGARDING
DEFENDANT'S MOTION TO
DISMISS**

Before the Court are Defendant's Motion to Dismiss, ECF Nos. 9, 12. The motions were heard without oral argument. Defendant is represented by Margaret Ann Burnham, Meagan A. Himes, and Sarah Elizabeth Ames Benedict. Plaintiff is represented by Robert T. Wright and Samuel James Fenton.

On November 6, 2023, Plaintiff filed this action in Spokane County Superior Court. Defendants removed the action to the Eastern District of Washington. On February 9, 2024, Plaintiff filed an Amended Complaint, asserting claims for failure to accommodate under the Americans with Disabilities Act (ADA) and the Washington Law Against Discrimination (WLAD), as well as disability discrimination / disparate treatment, age discrimination, and gender discrimination under the WLAD.

Defendant now moves to dismiss Plaintiff's Amended Complaint. Defendant

ORDER DENYING DEFENDANT'S MOTION TO DISMISS ~ 1

1 argues that: (1) Plaintiff cannot allege a failure to accommodate claim under the
2 ADA or the WLAD because he fails to plead he was disabled as the term is defined
3 by the WLAD and because his proposed accommodation would impose an undue
4 hardship under both laws; (2) Plaintiff's disability-related claims cannot survive
5 because he could not perform his essential job functions unvaccinated without
6 posing a direct threat; and (3) Plaintiff's First Amended Complaint does not allege
7 sufficient facts to state claims for age and gender discrimination under Fed. R. Civ.
8 P. 8.

9 **Motion Standard**

10 To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege
11 "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp.*
12 *v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face when "the
13 plaintiff pleads factual content that allows the court to draw the reasonable
14 inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*,
15 556 U.S. 662, 678 (2009). As the Ninth Circuit explained:

16 To be entitled to the presumption of truth, allegations in a complaint or
17 counterclaim may not simply recite the elements of a cause of action but
18 must contain sufficient allegations of underlying facts to give fair notice
19 and to enable the opposing party to defend itself effectively. The factual
20 allegations that are taken as true must plausibly suggest an entitlement to
21 relief, such that it is not unfair to require the opposing party to be subjected
22 to the expense of discovery and continued litigation.
23 *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

24 When evaluating a Rule 12(b)(6) motion, the court must draw all reasonable
25 inferences in favor of the non-moving party. *Wolfe v. Strankman*, 392 F.3d 358,
26 362 (9th Cir. 2004). However, the court is not required to accept conclusory
27 allegations as true or to accept any unreasonable inferences in a complaint. *In re*
28 *Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1054 (9th Cir. 2008).

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Plaintiff's Claims

Plaintiff alleges he was terminated after he sought but was denied a medical exemption to the COVID-19 vaccination requirement. He is bringing five claims: (1) Failure to accommodate under the Americans with Disability Act¹ (ADA); (2) Failure to accommodate under the Washington Law Against Discrimination (WLAD); (3) Disparate treatment on account of disability discrimination under the WLAD; (4) Age discrimination under the WLAD; and (5) Gender discrimination under the WLAD.

(1) Failure to Accommodate – ADA

To allege a prima facie case for discrimination under the ADA, Plaintiff must show (1) he is disabled within the meaning of the ADA; (2) he is a qualified individual able to perform the essential functions of the job with reasonable accommodation, and (3) he suffered an adverse employment because of his disability. *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012) (quotation omitted).

(1) Disability

The term “disability” means, with respect to an individual--

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment . . .

(2) Major life activities

- (A) In general

¹ The ADA was first enacted in 1990 and became effective July 26, 1992. The ADA Amendments Act of 2008 (ADAA) became effective January 1, 2009. The ADAA reflected Congress’ view that the Supreme Court had interpreted the ADA in an unduly narrow fashion in *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002), and *Sutton v. United Air Lines*, 527 U.S. 471 (1999). See *Weaving v. City of Hillsboro*, 763 F.3d 1106 (9th Cir. 2014).

1 For purposes of paragraph (1), major life activities include, but are not
2 limited to, caring for oneself, performing manual tasks, seeing, hearing,
3 eating, sleeping, walking, standing, lifting, bending, speaking, breathing,
4 learning, reading, concentrating, thinking, communicating, and working.

4 (B) Major bodily functions

5 For purposes of paragraph (1), a major life activity also includes the
6 operation of a major bodily function, including but not limited to, functions
7 of the immune system, normal cell growth, digestive, bowel, bladder,
8 neurological, brain, respiratory, circulatory, endocrine, and reproductive
9 functions.

8 42 U.S.C. § 12102(1)-(2).

9 In the employment context, a qualified individual with a disability may show
10 an ADA discrimination in either of two ways: by presenting evidence of disparate
11 treatment or by showing a failure to accommodate. *Dunlap v. Liberty Natural*
12 *Prods., Inc.*, 878 F.3d 794, 798 (9th Cir. 2017). Once an employer becomes aware
13 of the need for accommodation, that employer has a mandatory obligation under
14 the ADA to engage in an interactive process with the employee to identify and
15 implement appropriate reasonable accommodations. *Humphrey v. Memorial*
16 *Hosps. Ass’n*, 239 F.3d 1128, 1138 (9th Cir. 2001).

17 To state a claim for failure to provide reasonable accommodation under the
18 ADA, Plaintiff must allege: (1) he is a “qualified individual”²; (2) Defendant
19 received adequate notice of Plaintiff’s disability and desire for a reasonable
20 accommodation; and (3) a reasonable accommodation is available that would have
21 enabled Plaintiff to perform the essential functions of the job. Ninth Circuit Pattern
22 Jury Instruction 12.7.

23 Plaintiff alleges he is disabled within the meaning of the ADA and the
24 WLAD, as his asplenia, monorchism, and solitary kidney render him permanently
25

26 ²The term “qualified individual” means an individual who, with or without
27 reasonable accommodation, can perform the essential functions of the employment
28 position that such individual holds or desires. 42 U.S.C. § 12111(8).

1 immunocompromised and substantially limit one or more major life activities,
2 including the operation of major bodily functions, such as functions of the immune
3 system, reproductive system, and circulatory system.

4 Plaintiff alleges he was able to perform the essential functions of his job as a
5 physical therapist at Shriners Hospital with or without reasonable accommodation,
6 as evidenced by his successful treatment of patients during the COVID-19
7 pandemic via the utilization of personal protective equipment and safety measures
8 designed to minimize the spread of COVID-19.

9 Plaintiff alleges Defendant unlawfully discriminated against him in violation
10 of the ADA by refusing and/or failing to engage in an interactive process with him
11 to determine if an appropriate accommodation existed, despite receiving notice of
12 his disability and request for accommodation from Shriners' COVID-19
13 Vaccination Policy.

14 Here, Plaintiff has alleged sufficient facts to state a claim for failure to
15 accommodate. Plaintiff has alleged sufficient facts to show that he was disabled
16 within the meaning of the ADA, he was qualified to perform the essential functions
17 of the job with reasonable accommodation, and he suffered an adverse
18 employment because of his disability. He has also alleged sufficient facts to show
19 that Defendant failed to engage in the interactive process with him.

20 Whether Plaintiff's proposed accommodation would impose an undue
21 hardship and whether he was unable to perform his essential job functions
22 unvaccinated without posing a direct threat will need to be determined at a later
23 proceeding.

24 **(2) Failure to Accommodate Under the WLAD**

25 Similarly, the Washington Law Against Discrimination requires an employer
26 to reasonably accommodate an employee with a disability unless the
27 accommodation would pose an undue hardship. Wash. Rev. Code § 49.60.180(2).
28 "Disability" under the WLAD means the presence of a sensory, mental, or physical

1 impairment that is medically cognizable or diagnosable. Wash. Rev. Code §
2 49.60.040(7)(a).

3 “Impairment” includes but is not limited to: (i) Any physiological disorder,
4 or condition, cosmetic disfigurement, or anatomical loss affecting one or more of
5 the following body systems: Neurological, musculoskeletal, special sense organs,
6 respiratory, including speech organs, cardiovascular, reproductive, digestive,
7 genitor-urinary [genitourinary], hemic and lymphatic, skin, and endocrine. §
8 49.60.040(7)(C).

9 For purposes of qualifying for a reasonable accommodation in employment,
10 an impairment must be known or shown through an interactive process to exist in
11 fact and:

12 (i) The impairment must have a substantially limiting effect upon the
13 individual’s ability to perform his or her job, the individual’s ability to apply
14 or be considered for a job, or the individual’s access to equal benefits,
privileges, or terms or conditions of employment; or

15 (ii) The employee must have put the employer on notice of the existence of
16 an impairment, and medical documentation must establish a reasonable
17 likelihood that engaging in job functions without an accommodation would
18 aggravate the impairment to the extent that it would create a substantially
limiting effect.

19 Under Washington law, to allege a prima facie case for a failure to
20 reasonably accommodate a disability, the plaintiff must show that (1) the employee
21 had a sensory, mental, or physical abnormality that substantially limited his or her
22 ability to perform the job, and either (a) the impairment had a substantially limiting
23 effect on the individual’s ability to perform the job or (b) the employee put the
24 employer on notice of the impairment’s existence and medical documentation
25 established a reasonable likelihood that engaging in the job functions without an
26 accommodation would create a substantially limiting effect; (2) the employee was
27 qualified to perform the essential functions of the job in question; (3) the employee
28 gave the employer notice of the abnormality and its accompanying substantial

1 limitations; and (4) upon notice, the employer failed to affirmatively adopt
2 measures that were available to the employer and medically necessary to
3 accommodate the abnormality. *Gamble v. City of Seattle*, 6 Wash.App.2d 883,
4 888-89 (2018).

5 Plaintiff alleges he is disabled within the meaning of the WLAD in that he
6 has a permanent physical impairment which has been medically diagnosed as
7 asplenia, monorchism, and solitary kidney, the absence of major organs within the
8 hemic, reproductive, lymphatic and endocrine systems. As a result of his disability,
9 Plaintiff is permanently immunocompromised and impacted by vaccines in a
10 different manner than those without his disability and is medically recommended
11 to take certain precautions before administering vaccines, including consulting
12 studies as to the safety and efficacy of said vaccines. He alleges he was qualified to
13 perform his job at Shriners as a physical therapist and he was able to perform the
14 essential functions of his job as a physical therapist at Shriners Hospital with or
15 without reasonable accommodation, as evidenced by Mr. Mildes' successful
16 treatment of patients during the COVID-19 pandemic via the utilization of personal
17 protective equipment and safety measures designed to minimize the spread of
18 COVID-19.

19 Here, Plaintiff has alleged adequate facts to allege a prima facie claim for
20 failure to reasonably accommodate a disability. Plaintiff has alleged that he has a
21 physical abnormality that substantially limited his ability to perform the job
22 because he was required to receive the COVID-19 vaccine to perform his job, but
23 he was unable to receive the vaccine because of his physical abnormalities.
24 According to the allegations, Defendant was put on notice of his impairment and
25 Defendant refused to accommodate him to allow him to continue his employment.

26 Whether Plaintiff's proposed accommodation would impose an undue
27 hardship and whether he was unable to perform his essential job functions
28 unvaccinated without posing a direct threat will need to be determined at a later

1 proceeding.

2 **3. Disparate Treatment, Age Discrimination, and Gender**
3 **Discrimination under the WLAD**

4 Disparate treatment occurs when an employer treats some people less
5 favorably than others because of disability or other protected status. *Hegwine, v.*
6 *Longview Fibre Co.*, 162 Wash.2d 340, 354 n.7 (2007); Wash. Rev. Code §
7 49.60.180(3). To show that Defendant discriminated against Plaintiff, he must
8 allege the following: (1) Defendant took an adverse employment action against
9 him and (2) Plaintiff's disability/age/gender was a substantial fact in Defendant's
10 decision to take the adverse action.³ Wash. Pattern Jury Instruction Nos. 330.01,
11 330.32.

12 Plaintiff alleges Defendant unlawfully terminated him in violation of the
13 WLAD when it terminated him from his employment because he did not receive
14 the COVID-19 vaccine to perform his job, but he was unable to receive the vaccine
15 because of his disability. He also alleges facts showing that Defendant treated
16 younger employees and female employees more favorably when making
17 COVID-19 related accommodations and that his age and gender were a substantial
18 factor motivating Defendant to terminate his employment.

19 Plaintiff has alleged sufficient facts to support his claims that his disability,
20 age, and gender served as substantial factors in his termination.

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26 ³With respect to his discrimination based on his disability claim, Plaintiff must also
27 show that he has a disability and is able to perform the essential functions of the
28 job in question with reasonable accommodation. WPJI No. 330.32.

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Defendant's Motion to Dismiss for Failure to State a Claim, ECF No.
3 9, is **DENIED**.

4 2. Defendant's Motion to Dismiss for Failure to State a Claim, ECF No.
5 12, is **DENIED**.

6 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
7 file this Order and provide copies to counsel.

8 **DATED** this 26th day of March 2024.



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A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

15 Stanley A. Bastian
16 Chief United States District Judge
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